4. The effort made in the principal case on the part of the defendant to secure an order bringing in the assignor under the general statute authorizing new parties who are necessary to a complete determination of the controversy, was doomed to failure under the commonly accepted interpretation of that statute. It has been held to apply only to equitable causes of action or cross-demands. *Chapman* v. *Forbes* (1890), 123 N. Y. 538. In the principal case the court distinguished *State ex rel. Adjustment Co.* v. *Superior Court,* 67 Wash. 355, on the ground that there the counterclaim was not a mere money demand aaginst the assignee, but an equitable defense calling for affirmative relief. Another case where the assignor was brought in on a counterclaim pleaded against the assignee is *Gildersleeve* v. *Burrows* (1873), 24 Ohio St. 204, where the counterclaim was an equitable set-off. To be sure, the statute contains no express restriction to equitable actions and cross-demands, but the inevitable tendency to limit the scope of procedural innovations has fixed this implied restriction.

5. The whole question of third parties coming into actions at law has received a broad and generous stimulus in England and some of the British dominions through rules authorizing so-called Third Party Procedure, whereby any defendant entitled to contribution or indemnity over against any other person not a party to the action may by leave of court bring such party in, and thereby have the whole controversy, including the indemnity or contribution, settled in a single action. England, ORDER 16, rule 48. The practice is widely employed and has demonstrated its great utility.

6. It is apparent that the principal case, while rightly decided under the current authorities, exhibits the very low state of procedural development from which we suffer in this country, and suggests the need of both a more progressive attitude on the part of our courts and a more enlightened legislative policy. E. R. S.

"THE FAMILY AUTOMOBILE"—LIABILITY OF OWNER FOR ITS NEGLIGENT USE BY A MEMBER OF HIS FAMILY.—The advent of the "family automobile" has brought with it the question as to the liability of an owner of a machine, which he buys for the pleasure and convenience of his family, for injuries resulting from the negligent use thereof by a member of his family, with his consent. A recent case, *Spence* v. *Fisher* (Cal., 1920), 193 Pac. 255, reflects the confusion and divergence of opinion upon what has become known as the "family purpose" doctrine of liability.

Of course, it is universally admitted that the mere fact of ownership does not make a father liable for the negligent acts of his child in the use of the car. Nor does the mere relationship of parent and child make the former liable *per se*. *Erlick* v. *Heis,* 193 Ala. 669, 69 So. 530. It is substantially agreed that the father is liable if the child is acting as his actual agent in driving the machine. *Morrison* v. *Clark,* 14 Ala. App. 323, 70 So. 200. And in accordance with the general principles of agency, he is not liable if the child steps out of his position as agent by making a deviation from his father's business for his own pleasure. *Jennings* v. *Okin,* 88 N. J. L. 659,

97 Atl. 249. Thus, also, he is not liable if the child has taken the car against his command. *Johnston* v. *Cornelius,* 193 Mich. 115, 159 N. W. 318.

At this point the divergence of opinion begins, and it seems to the writer that at the root of this seemingly irreconcilable conflict upon this doctrine of imputed negligence lies the failure to classify the various cases according to their fundamental facts. In practically all of the cases in this field the facts involve the purchase and maintenance by the head of the family of a machine for the pleasure, use and convenience of the family, the express or implied consent to its use by any member of the family, a subsequent negligent use by one of the family, and a resulting injury to a third party, for which suit is brought against the head of the family. Behind this skeleton of facts lie other facts that form the basis of a classification that helps one make his way through what has been called a "trackless forest of cases."

First, there are the cases where the child, most often a son, is the family chauffeur, where the father is the registered owner of the car, but the son is the only licensed driver in the family. In such plainly there is a patent relationship of principal and agent or master and worker, in which, by the application of the doctrine of respondeat superior, the father can be held liable for the negligent acts of his appointed driver. In this class are *Smith* v. *Jordan,* 211 Mass. 269, 97 N. E. 761; *Daily* v. *Maxwell,* 152 Mo. App. 415, 133 S. W. 351; *Bourne* v. *Whitman,* 209 Mass. 155, 95 N. E. 404; and *Lewis* v. *Steele,* 52 Mont. 300, 157 Pac. 575, all often cited as upholding a much broader doctrine of liability.

Second, there are the cases where the negligent member of the family is driving members of the family, either at the express command of the father or in obedience to an implied request to drive them about. In such cases the machine is being used for the purpose for which the *pater familias* purchased and maintained it: the pleasure and convenience of his family. At the time of the accident manifestly the child is the agent of his father, carrying out the purposes of his father, as much as if the owner had hired a third person outside the family to act as chauffeur. *McNeal* v. *McKain,* 33 Okla. 449, 126 Pac. 742 (driving sister); *Lemke* v. *Ady* (Ia., 1916), 159 N. W. 1011 (driving mother).

Third, there are the cases where the child, granted permission to use the machine for his own purposes, at the time of the accident is driving alone or with persons other than members of his family. It is in this last class alone that the real conflict of opinion arises. Some courts have adopted the "family purpose" doctrine in its full scope, and have unqualifiedly applied it even where the child was driving for his own purpose, on the theory that the car at the time of the accident was being used for the purpose or business for which it was kept, and that the person operating it, therefore, was acting as the owner's agent or servant in using it. *Birch* v. *Abercrombie,* 74 Wash. 486, 133 Pac. 1020; *Benton* v. *Regeser,* 20 Ariz. 273, 179 Pac. 966; *Plasch* v. *Fass* (Minn., 1919), 174 N. W. 438 (wife was driving for own pleasure while husband was out of the state). On the other hand, other courts have squarely rejected this doctrine of liability on the ground that the view asserting liability strains the logic of the situation and unwarrant-

edly stretches the principles of agency. *Spence* v. *Fisher, supra; Doran* v. *Thomsen,* 76 N. J. L. 754, 71 Atl. 296; *Arkin* v. *Page* (Ill., 1919), 123 N. E. 30; *Van Blaricom* v. *Dodgson,* 220 N. Y. 111, 115 N. E. 443; *Watkins* v. *Clark,* 103 Kan. 629, 176 Pac. 131.

The view upholding liability in this last class of cases is founded upon what has been called the "somewhat attenuated" theory that a minor in amusing himself is acting as agent in his father's behalf. A parent, these tribunals argue, owes a duty of furnishing recreation and pleasure to his children, and when they employ themselves in pursuit of such recreation and amusement they become his agents. Burch, J., in *Watkins* v. *Clark, supra,* waxes sarcastic over this theory:

"So," he points out, "if daughter took her friend riding she might think she was out merely for her own pleasure; but she was mistaken; she was conducting father's 'business' as his 'agent.' * * * If son took his best girl riding, *prima facie* it was father's little outing by proxy, and if any accident happened, *prima facie* father was liable."

As the New York Court of Appeals said in *Van Blaricom* v. *Dodgson, supra,* holding the father liable for the negligent acts of his child while the latter was using the family car for his own convenience or pleasure, while engaged exclusively on a mission of his own, is certainly "an advanced proposition in the law of principal and agent," presenting "a case of such theoretical and attenuated agency, if any, as would be beyond the recognition of sound principles of law as they are ordinarily applied to that relationship."

"The doctrine that the pleasure of the family in its utmost detail is the business of the father has no firm foundation in reason or common sense. In theory it overlooks well-settled principles of law; in practice it would interdict the father's generosity and his reasonable care for the pleasure or even the well-being of his children by imposing a universal responsibility for their acts." *Parker* v. *Wilson,* 179 Ala. 361, 60 So. 150.

The tribunals asserting universal liability really base the creation of the relation of master and servant, which they read into the facts, upon the purpose which the parent had in mind in purchasing the car and in permitting the family to use it. This proposition plainly ignores an essential element in the creation of that status as to third persons; such use must be in furtherance of, and not apart from, the master's service and control. It fails to distinguish between a mere permission to use and a use subject to the control of the master and connected with his affairs. *Doran* v. *Thomsen, supra.* The purpose of the parent in buying the car cannot of itself create the relationship contended for. *Hays* v. *Hogan,* 273 Mo. 1, 200 S. W. 286, reversing 180 Mo. App. 237, 165 S. W. 1125.

Weighing the arguments of the two lines of cases, the better reason seems to be with those which deny liability when the child is out for a "spin" of his own. The trend of the latest decisions is towards this view. The argument that the pleasure and recreation of the family is the father's business, carried to its logical conclusion, would make the father absolutely liable for every tort of every member of the family while such member is seeking his own pleasure. If the doctrine is sound, *Arkin* v. *Page, supra,* points out,

it ought to be equally applicable where the thing used is a bicycle, horse, gun, golf-clubs, etc. Yet, it is very probable that even the courts upholding this view would deny the existence of a master and servant relationship upon which to base liability in cases involving these. It is interesting to note that the liability of a father has been denied in the case of a horse being driven by his son. *Maddox* v. *Brown,* 71 Me. 432.

A close examination of the reasoning of the courts which accept this proposition, which is seemingly contradictory on its very face, asserting, as it does, that a person who is wholly and exclusively engaged in the prosecution of his own concerns is, nevertheless, engaged as agent in doing something for someone else, shows that, in truth, there runs through practically all of the cases an under-current of the idea, that because an automobile is more dangerous when carelessly used than most other family agencies there should be an extension of the established doctrine of agency to safeguard its use.

In *Birch* v. *Abercrombie, supra,* the court said: "Any other view would set a premium upon the failure of an owner to employ a competent chauffeur to drive a car kept for the use of the members of the family. The adoption of a doctrine so callously technical would be little short of calamitous."

King v. *Smythe,* 142 Tenn. 217, 204 S. W. 296, denies that an automobile is such a dangerous agency, *per se,* as to make its owner liable universally, yet it admits that it holds a father liable for its negligent use by his son because of "the dangerous character of automobiles."

Adopt this view of the nature of the automobile and, as one judge put it, you change the old maxim to read, *"Qui facit per auto facit per se."* The difficulty is that practically every court which has passed on the question squarely has repudiated any such doctrine that an automobile is within the rule making the owner of an inherently dangerous instrumentality liable for the use thereof by any person. *Tyler* v. *Stephen,* 163 Ky. 770, 174 S. W. 790; *Premier Motor Mfg. Co.* v. *Tilford,* 61 Ind. App. 164, 111 N. E. 645. But see *Southern Oil Co.* v. *Anderson, infra.*

One of two alternatives faces the court: either they must, considering the great increase in the number of "family cars" and their resulting negligent use by reckless young drivers on crowded streets, desert their old ideas on the danger of the automobile, and henceforth recognize it as an instrumentality within the rule whereby owners of dangerous agencies are held liable for their use by any person (except in cases of independent acts or acts of God); or the legislatures of the several states must come to their aid with statutes fixing the liability of the owners. The attenuated agency theory will not stand.

A most recent case dealing with the negligent use of an automobile owned by a corporation while being driven by one of its agents goes exhaustively into the history of automobile accidents in the United States in the past few years, and shows that the time has come to recognize the machine as an inherently dangerous agency. *Southern Oil Co.* v. *Anderson* (Fla., 1920), 86 So. 629. It is submitted that liability established on such ground is far more reasonable than on the agency theory.

Yet it seems that, after all, it is not the ferocity of the automobile that is to be feared, but the ferocity of those who drive them. Considering that the vehicle is one that in the hands of reckless drivers spreads over the land the maimed and dead until, as one court put it, "it has belittled the cruelties of the car of Juggernaut," considering that parents who entrust such agencies in the hands of reckless minors should in all justice be liable for injuries inflicted by them, and taking into account the undoubted practical considerations in favor of the doctrine of *respondeat superior,* since it puts the financial responsibility of the owner, who can insure himself, behind the car while it is being used by a member of the family, who is likely to be financially irresponsible, it seems liability should fall on the parent. Admitting the rule to be fair, it must be created by legislative enactment, not by a judicial distortion of the principles of agency.

For a discussion of such statutes, see 19 MICH. L. REV. 333, and 6 CORNELL LAW QUART. 187, where the writers adopt opposite views as to the validity of a Michigan statute. H. A. A.

PUBLIC UTILITY RATES—STATE POWER OVER MUNICIPALITY.—Under constitutional authority, a city gave its consent to the construction of a street railway on condition, among other things, that the company enter into a contract fixing rates of fare. The company asked of the Public Service Commission an order raising the rates so fixed, on the ground that the contract rates had become unreasonable. *Held,* that while the contract rates may be binding as between the parties to the contract, they have no binding force when in conflict with rates fixed by a state commission in the manner prescribed by the statute. *City of Scranton* v. *Public Service Com.* (Pa., June, 1920), 110 Atl. 775.

It has often been suggested that power to fix rates is one of the police powers of sovereignty that is never to be presumed to be given up unless it is clear beyond doubt. 18 MICH. L. REV. 806, 19 *ib.* 112; *Richmond* v. *C. & P. Tel. Co.* (Va., 1920), 105 S. E. 127; *Hoyne* v. *Elevated Co.* (Ill., 1920), 120 N. E. 587. In *Charleston* v. *Pub. Serv. Com* (W. Va., 1920), 103 S E. 673, the court distinguishes between matters of proprietary right in which a sovereign state may permit a municipality to make an inviolable contract and those phases of police power relating to public safety, health, and morals. It has been intimated that the power to fix permanent rates may be considered to be a power which cannot be surrendered by the state *Chicago Rys. Co.* v. *Chicago,* 292 Ill. 190 (1920); *Niagara Falls* v. *Pub. Serv. Com.* (N. Y., 1920), 128 N. E. 247; *Camden* v. *Arkansas C. & P. Co.* (Ark., 1920), 224 S. W. 444. Municipalities and companies are conclusively presumed to know this when they become parties to a contract, and therefore to know "that the sovereign police power of the state to modify its terms would be supreme whenever the general well-being of the public so required," as the court puts it in the instant case. But cf. *Ottumwa Co.* v. *Ottumwa* (Ia., 1920), 178 N. W. 905. But this is a rule that should work both ways. If the state in its sovereignty can raise the rates in favor of the utility, then equally in proper case it should be able to lower contract rates in favor of the public.